

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

ANNUAL COMPLIANCE REVIEW, 2014

Docket No. ACR2014

**UNITED PARCEL SERVICE, INC.'S MOTION REQUESTING ACCESS  
TO NON-PUBLIC MATERIALS RELEVANT TO COMPLIANCE  
UNDER PROTECTIVE CONDITIONS**

(January 9, 2015)

United Parcel Service, Inc. ("UPS"), a company affiliated with the delivery services industry, respectfully submits this Motion pursuant to Commission Rules 3001.21, 3007.40, and 3007.50, requesting access to a limited subset of non-public materials the United States Postal Service filed with the Commission on December 29, 2014, as part of the Postal Service's Annual Compliance Report ("ACR").

UPS seeks access to the library references identified in Exhibit 1 for its outside counsel and consultants, so they may assist UPS in making informed comments in the Commission's fiscal year ("FY") 2014 Annual Compliance Determination ("ACD") proceeding. See PRC Dkt. No. ACR2014, Order No. 2313 (December 31, 2014) (inviting comments). As discussed below, the requested materials are relevant to assessing whether the Postal Service complied in 2014 with the mandate of the Postal Accountability and Enhancement Act ("PAEA") that the Postal Service's competitive products pay their own costs, without subsidy from market-dominant products. See 39 U.S.C. § 3633.

In addition to the Commission's standard protective conditions, which prohibit sharing protected materials with persons "involved in competitive decision-making," 39



C.F.R. Part 3007, Appendix A at 1, UPS further agrees to limit access to its *outside* counsel and consultants only. UPS agrees to this additional step in an effort to expedite UPS's ability to obtain access to these materials.

As discussed more fully below, UPS has conferred with the Postal Service regarding this request. Yet despite UPS's best efforts, as of the date of this motion, the Postal Service was not able to inform UPS about whether it consents to the request.

The Postal Service was able to confirm that ten of the requested library references (identified as "Category A" on Exhibit 1) do not contain proprietary information of any third parties. UPS's request for these files is thus entitled to expedited treatment under Rules 3007.40(b)(1) and 3007.50(b)(1), because UPS has attached as Exhibit 2 executed copies of the protective conditions approved by the Commission in PRC Dkt. No. RM2008-1, Order No. 225 (June 19, 2009) ("Order No. 225") and contained in part 3007 of the Commission's rules.<sup>1</sup> Accordingly, any responses to the request for these materials would be due in three days. Such expedited treatment is necessary given the February 2 deadline for filing initial comments in this proceeding.

The Postal Service has also indicated to UPS that three of the requested files (identified as "Category B" on Exhibit 1) may possibly contain proprietary information of third parties – although the Postal Service had not specifically identified these files as having any third-party information in its *Application for Nonpublic Treatment*. See PRC

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<sup>1</sup> Exhibit 2 contains executed copies of the Commission's protective conditions by: (i) Steig D. Olson, on behalf of Quinn Emanuel Urquhart & Sullivan LLP, (ii) John McKeever, on behalf of McKeever & Mitchell, and (iii) Kevin Neels, on behalf of the Brattle Group. Quinn Emanuel and McKeever & Mitchell are outside counsel for UPS, and the Brattle Group is an outside consulting firm.



Dkt. No. ACR2014, *FY 2014 Annual Compliance Report*, Attachment 2, at 2-8 (December 29, 2014). To the extent there is any third-party information in these files, UPS's willingness to limit access to outside counsel and consultants addresses any concern. Under these circumstances, UPS submits that it should be entitled to expedited treatment with regard to its request for these three files as well.

Accordingly, UPS respectfully requests that the Commission direct the Postal Service to provide access to the library references identified on Exhibit 1 as promptly as possible.

### **SUMMARY OF MEET AND CONFER PROCESS**

On January 2, 2015, UPS wrote to Postal Service counsel identifying the materials for which it planned to request access, explaining the restrictive protective conditions to which UPS agreed, and requesting the Postal Service's consent.

On January 5, 2015, UPS had a teleconference with Postal Service counsel. In its letter, UPS had originally requested access to certain files that concerned international costing (USPS-FY14-NP2 - USPS-FY14-NP6), as well as a file concerning domestic competitive negotiated service agreements (USPS-FY14-NP27). Postal Service counsel raised a concern that those requests implicate information that might be proprietary to numerous third parties. UPS expressed a willingness to forego seeking access to those files and asked whether the Postal Service would consent to that narrowed request.

UPS and Postal Service counsel spoke again on January 8, 2015. Postal Service counsel, however, still could not provide the Postal Service's position on the narrowed request. As noted, Postal Service counsel also identified a few more library



references that might have proprietary information of third parties. As a result, UPS decided to forego requesting two more files. UPS explained that, given the timeframe of the ACD, however, it needed to file its request by Friday, January 9. UPS and Postal Service counsel exchanged email correspondence again on January 9, but the Postal Service was still not able to provide its position.

## **ARGUMENT**

### **I. The Ability of the Commission to Meet Congress's Goals in the Annual Compliance Determination Depends on Informed Participation by Entities Such as UPS.**

Congress's primary objective in enacting 39 U.S.C. § 3633 as part of PAEA was to ensure that the Postal Service competes on a "level playing field" vis-à-vis its competitors in the market for competitive products.<sup>2</sup> Thus, § 3633 prohibits the Postal Service from using revenues from its market-dominant products to subsidize its competitive products. Congress sought to ensure, in other words, that the Postal Service's competitive products business would stand on its own financial footing.

Congress also sought to ensure that the Commission would receive effective participation from the public to assist the compliance determination. Thus, 39 U.S.C. § 3653(a) instructs the Commission to "promptly provide an opportunity for comment" by "affected parties" on the Postal Service's ACR, in order to assist the Commission in determining whether the Postal Service is complying with PAEA.

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<sup>2</sup> See, e.g., H.R. Rep. No. 109-66, 44 (2005) ("Under the legislation, the Postal Service will compete on a level playing field, under many of the same terms and conditions as faced by its private sector competitors, albeit with stronger controls, oversight, and limitations in recognition of its governmental status. The Postal Service will be given flexibility to price competitive products, but competitive products and services will have to pay their own costs without subsidy from market-dominant mail revenues.").



As the Commission has observed, PAEA “relies on public transparency . . . to achieve its goal of Postal Service accountability.” PRC Dkt. No. RM2008-1, Order No. 194 (March 20, 2009) (“Order No. 194”) at 2; see *also* Order No. 225 at 7 n. 5. The Commission has recognized that “[f]or the public to participate effectively and comment in an ongoing or upcoming annual determination of compliance, the Commission anticipates that persons may require access to non-public materials . . . .” Order No. 194 at 6. Thus: “Current rules permit parties to access non-public information subject to protective conditions.” PRC Dkt. No. ACR2013, *FY 2013 Annual Compliance Determination* at 98 (March 27, 2014).

**II. The Requested Materials Are Relevant, Access to them is Necessary for UPS to Participate Effectively in the ACD Process, and UPS’s Interest in These Materials Far Outweighs Any Interest in Shielding Them from UPS’s Outside Counsel and Consultants.**

“To determine if access to [non-public] materials is appropriate, the Commission must determine that the materials are relevant to an ongoing or upcoming ACD, and balance the Postal Service’s . . . evidentiary privilege interest against the need of the requesting party to participate effectively.” Order No. 194 at 6; see *also* 39 C.F.R. 3007.42. UPS’s request clearly satisfies this test.

The requested materials are directly relevant to the ACD – they are a subset of the materials the Postal Service itself submitted in connection with the ACD. Moreover, UPS has a substantial interest under PAEA in the requested materials. Without access to this data, UPS would not have a meaningful opportunity to file comments on whether the Postal Service is properly accounting for the costs of its competitive products, both as a whole and individually, despite its undisputed right to do so.



The Postal Service, on the other hand, has no legitimate interest in shielding the requested data given UPS's agreement to the protective conditions approved by the Commission and its further agreement not to share these materials with its employees.

**A. UPS needs the requested materials to participate effectively in the ACD process.**

A central question in this proceeding is whether the Postal Service is fully and accurately accounting for the incremental costs of its competitive products. In Order No. 399, the Commission adopted the method described by Postal Service witnesses Bradley and Kaye in Docket No. R2000-1 for purposes of calculating the incremental costs of competitive products under the test the Commission established pursuant to 39 U.S.C. § 3633(a)(1).<sup>3</sup> If some of these incremental costs are being overlooked, misclassified, or calculated incorrectly, then this test may be failing to accomplish its statutorily-mandated purpose.

UPS has asked its outside consultants and lawyers to analyze the data submitted by the Postal Service to determine how the Postal Service is calculating the incremental costs of its competitive products and whether that is being done in accordance with Order No. 399. The *public* data, however, does not permit UPS's consultants to assess how the Postal Service is applying its incremental cost methodology to the costs of its competitive products business, much less to determine whether that methodology is fully capturing all relevant costs. As the Postal Service acknowledges in its *Application for Nonpublic Treatment*, the folder that "presents the application of the incremental cost methodology" by the Postal Service was filed on a

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<sup>3</sup> In PRC Dkt. No. RM2010-4, Order No. 399 (January 27, 2010), the Commission accepted the "incremental cost test" described by Professor Bradley and witness Kaye in Docket No. R2000-1 as the "conceptually correct method." *Id.* at 2.



non-public basis. *FY 2014 Annual Compliance Report*, Attachment 2, at 10. Much of the data that underlies the application of that methodology was also filed non-publicly. The materials identified in Exhibit 1 go directly to these issues.

Access to the materials identified in Exhibit 1 is also necessary to determine whether the Postal Service is fully and accurately accounting for the attributable costs of *each* domestic competitive product, as required by § 3633(a)(2). Again, as the Postal Service itself acknowledges, “[i]n general,” with certain exceptions, “all disaggregated cost information relating to Competitive products, and all background data used to develop disaggregated cost information on Competitive products” was filed non-publicly. *Id.* at 1-2. It is not possible for UPS effectively to analyze the Postal Service’s compliance with the requirements of § 3633(a)(2) without access to the disaggregated, product-specific data identified in Exhibit 1.

In short, providing access (under a protective order) to UPS’s outside counsel and consultants to these materials is consistent with PAEA’s directives of transparency, effective participation by affected parties, and Postal Service accountability.

**B. There can be no legitimate interest in shielding the materials from outside counsel and consultants retained by a party to file comments on the Postal Service’s ACR.**

Balanced against the strong interests in ensuring compliance with § 3633 and effective participation in the ACD process by affected parties, the Postal Service has no legitimate interest in shielding these files from access by UPS’s outside counsel and consultants. Since UPS is not seeking access for any of its employees, there is no concern that access could give UPS an unfair view of Postal Service confidential information. Indeed, none of the justifications offered by the Postal Service for filing these materials on a non-public basis apply to this request for access by outside



counsel and consultants, who are in no position to use the materials for any business purpose.

Nor does any third party have a legitimate interest in shielding the files identified in Category B on Exhibit 1 from UPS's outside counsel or consultants.<sup>4</sup> Again, the people who will have access to these materials are in no position to use them for any business purpose, but instead will use them to analyze *the Postal Service's* compliance with § 3633. Indeed, any third-party information that may be in these library references is not of interest to UPS.

### **III. Similar Materials Are Routinely Produced In Civil Litigation Under Federal Rule Of Civil Procedure 26(c).**

The standards of Federal Rule of Civil Procedure 26(c) guide the Commission in determining whether and how parties should be allowed access to non-public Postal Service materials. See Order No. 194 at 4-6; Order No. 225 at 8; 39 C.F.R. § 3007.42. Here, the standards of Rule 26(c) overwhelmingly support granting UPS's motion.

Under Rule 26(c), it is well-settled that even the most highly confidential information may be disclosed to competitors when appropriate protections are in place. In fact, such information is routinely exchanged between competitors in litigation under protective conditions, including those that limit access to the party's outside counsel and consultants. See, e.g., *U.S. Ethernet Innov. LLC v. Acer Inc.*, No. 10-CV-03724, 2014 WL 988757, at \*4 (N.D. Cal. Mar. 7, 2014) ("Intel's argument about harm by disclosure

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<sup>4</sup> These three library references go directly to the compliance issues discussed above: USPS-FY14-NP14 FY 2014 CRA "B" Workpapers contains key upstream components of the Postal Service's attributable cost calculations. The other two references – USPS-FY14-NP22 City Carrier Cost System (CCCS) Documentation and USPS-FY14-NP23 Rural Carrier Cost System (RCCS) Documentation – are necessary to determine the precision with which the Postal Service is assigning city and rural carrier costs.



of its confidential information to its competitors is assuaged by production only on an outside counsel, attorneys' eyes only, basis."). Third parties are also routinely ordered to produce sensitive information under protective conditions. See, e.g., *W. Conv. Stores, Inc. v. Suncor Energy (U.S.A.) Inc.*, No. 11-CV-01611, 2014 WL 561850, at \*1 (D. Colo. Feb. 13, 2014) ("During discovery, [the third party's] interest was addressed by a protective order that entitled Western's counsel and retained experts to view [the third party's] wholesale purchase and retail sales information, but forbade the recipients of the information from sharing it with [the plaintiff's owner] . . . ").<sup>5</sup>

### **CONCLUSION**

For the foregoing reasons, UPS respectfully requests that this Motion be granted. UPS further requests that the Commission address this request as expeditiously as possible and that the Postal Service be directed to provide prompt – indeed, immediate – access to these materials.

Respectfully submitted,

UNITED PARCEL SERVICE, INC.,

By: /s/ Steig D. Olson  
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New York, NY 10010  
(212) 849-7152  
steigolson@quinnemanuel.com

***Attorney for UPS***

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<sup>5</sup> UPS's willingness to agree to protective conditions that go above and beyond the Commission's standard protective conditions is not a concession that such extra protective conditions are necessary in this or any other proceeding. UPS only agrees to these extra conditions in this context to expedite the disposition of this Motion, given the time pressures it faces in this proceeding.



# **Exhibit 1**



**Category A (no third-party information):**

1. USPS-FY14-NP10 FY 2014 Competitive Products Incremental Cost and Group Specific Costs (Non-Public Version)
2. USPS-FY14-NP11 FY 2014 Non-Public Cost and Revenue Analysis (NPCRA) Report
3. USPS-FY14-NP12 FY 2014 Non-Public Cost Segments and Components Report
4. USPS-FY14-NP13 FY 2014 CRA Model (Model Files, Cost Matrices, and Reports) (Non-Public Version)
5. USPS-FY14-NP15 FY 2014 Parcel Select / Parcel Return Service (PRS) Mail Processing Cost Model
6. USPS-FY14-NP16 FY 2014 Parcel Select / Parcel Return Service Transportation Cost Model
7. USPS-FY14-NP18 Cost Segment 3 Cost Pools & Other Related Information (Non-Public Version)
8. USPS-FY14-NP19 FY 2014 Non-Operation Specific Piggyback Factors (Non-Public Version)
9. USPS-FY14-NP20 FY 2014 Mail Processing Costs by Shape (Non-Public Version)
10. USPS-FY14-NP26 FY 2014 Special Cost Studies Workpapers – Special Services (Non-Public Version)

**Category B (possible third-party information):**

1. USPS-FY14-NP14 FY 2014 CRA “B” Workpapers, (Non-Public Version)
2. USPS-FY14-NP22 City Carrier Cost System (CCCS) Documentation (Non-Public Version)
3. USPS-FY14-NP23 Rural Carrier Cost System (RCCS) Documentation (Non-Public Version)



# **Exhibit 2**



## **STATEMENT OF COMPLIANCE WITH PROTECTIVE CONDITIONS**

The Postal Service (or a third party) has filed non-public materials identified in Attachment One of the FY 2014 Annual Compliance Report in Commission Docket No. ACR2014. The Postal Service (or a third party) requests confidential treatment of the materials (hereinafter “these materials”).

The following protective conditions limit access to a specific subset of the materials identified in Attachment One of the FY 2014 Annual Compliance Report by the Postal Service (or third party). Each person seeking to obtain access to these materials must agree to comply with these conditions, complete the attached certifications, and provide the completed certifications to the Commission and counsel for the Postal Service.

1. Access to these materials is limited to a person as defined in rule 5(f), 39 CFR 3001.5(f), or an individual employed by such person, or acting as agent, consultant, contractor, affiliated person, or other representative of such person for purposes related to the matter identified as Commission Docket No. ACR2014. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. “Involved in competitive decision-making” includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.
2. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions.
3. Immediately after access has terminated under rule 39 CFR 3007.41 or 3007.51, a person (and any individual working on behalf of that person) who has obtained a copy of these materials shall certify to the Commission:
  - (a) That the copy was maintained in accordance with these conditions (or others established by the Commission); and
  - (b) That the copy (and any duplicates) either have been destroyed or returned to the Commission.



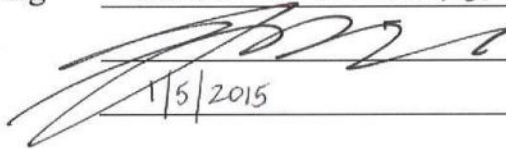
4. The duties of each person obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
5. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.
6. These conditions shall apply to any revised, amended, or supplemental versions of these materials provided in the matter identified as Commission Docket No. ACR2014.
7. The duty of nondisclosure of each person obtaining access to these materials is continuing, terminable only by specific order of the Commission, or as specified in paragraphs 9 and 10, below.
8. Each person granted access to these materials consents to these or such other conditions as the Commission may approve.
9. Any written materials that quote or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.
10. If a court or other administrative agency subpoenas or orders production of confidential information which a person has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within 2 business days) notify the Postal Service of the pendency of the subpoena or order to allow it time to object to that production or seek a protective order.



CERTIFICATION

The undersigned represents that:

Access to these materials provided in the matter identified as Commission Docket No. ACR2014 by the Postal Service has been authorized by the Commission. The cover or label of the copy obtained is marked with my name. I agree to use the information only for purposes of analyzing matters at issue in the matter identified as Commission Docket No. ACR2014. I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain these materials in strict confidence in accordance with all of the protective conditions set out above.

Name	<u>Steig Olson</u>
Firm	<u>Quinn Emanuel Urquhart &amp; Sullivan LLP</u>
Title	<u>Partner</u>
Representing	<u>United Parcel Service</u>
Signature	<u></u>
Date	<u>1/5/2015</u>



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2. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions.
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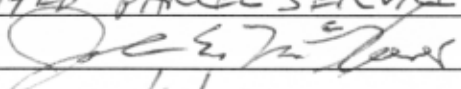
4. The duties of each person obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
5. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially sensitive, and privileged information.
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9. Any written materials that quote or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary's office or such other place as the Commission may designate so long as they retain their status as stamped confidential documents.
10. If a court or other administrative agency subpoenas or orders production of confidential information which a person has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within 2 business days) notify the Postal Service of the pendency of the subpoena or order to allow it time to object to that production or seek a protective order.



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Name	<u>JOHN E. M<sup>E</sup>KEEVER</u>
Firm	<u>M<sup>E</sup>KEEVER + MITCHELL</u>
Title	<u>PARTNER</u>
Representing	<u>UNITED PARCEL SERVICE</u>
Signature	<u></u>
Date	<u>1/6/15</u>



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4. The duties of each person obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
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Name

Kevin Neels

Firm

The Brattle Group

Title

Principal

Representing

UPS

Signature

Kevin Neels

Date

1/5/15